

No. 10265

United States
Circuit Court of Appeals
For the Ninth Circuit

MASON B. PATTEN,

Appellant,

—vs.—

J. CHARLES DENNIS, United States Attorney in and for
the Western District of Washington.

Appellee.

UPON APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

BRIEF OF APPELLANT

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Statement as to Jurisdiction on Appeal:

MAY IT PLEASE THE COURT:

Apepllant, in support of the jurisdiction of this
Court to review the above entitled case on appeal
presents:

This Court has jurisdiction of appeal under the fol-
lowing sections of the Judicial Code as amended:

Title 28, U.S.C.A., Section 371 (Judicial Code 256, Amended, Chapter 10)

Title 28, U.S.C.A., Section 225 (Judicial Code 128, Amended)

Title 28, U.S.C.A., Judicial Code, Section 41, Subdivision 12) (Section 24, Amended)

Title 28, U.S.C.A., Section 377C (Judicial Code, Section 262).

Jurisdictional Amount Involved:

Suit at Law for injury to person of Plaintiff.

Amount in controversy, irreparable injury.

Judgment for relief from injury sustained.

STATEMENT OF CASE

This is an appeal from order of Judge in the District Court of the United States in the Western District of the State of Washington (P. 13) dismissing an action against J. Charles Dennis, United States Attorney to Show Cause (p. 1) why a warrant should not be issued against one William B. Smith, Vaughn Bogard, Albert E. Larsen for conspiracy to violate title 18, section 51 and section 126 of the Criminal Codes (P. 2) with intent to injure the right of Mason B. Patten. The U. S. Attorney upon information of Mason B. Patten (P. 11) had refused to bring action against said William B. Smith, Vaughn Bogard, Albert E. Larsen, (P. 2).

On the 6th day of April, 1942, this Cause came on to be heard (P. 8) and (P. 9) on defendants motion to dismiss, re misjoinder of parties and to make more definite and certain, motion (P. 13) to dismiss was granted on each of the two grounds set forth to dismiss. Plaintiff excepted thereto. Exception was allowed.

On April 9, 1942, plaintiff petitioned the Court for rehearing of motion to dismiss (P. 14). Hearing was heard on Plaintiff's petition for rehearing on 13th of April, 1942 (P. 15). Also motion to amend original pleading (P. 16) which was granted.

On May 26, 1942, Notice of Appeal was filed (P. 17). On June 9, 1942 Designation of Portions of record was filed with clerk of District Court and a copy served on Defendant 9th day of June 1942. On June 19, 1942 Appellee filed additional designation of portions of records and (P. 19) proceedings, together with narrative of proceedings (P. 20 and P. 21). Thereupon Clerk of District Court prepared a transcript of record (P. 21) and was filed Sept. 24, 1942.

On June 22, 1942 Plaintiff makes motion for leave to this Court, Court of Appeals, (P. 23) in which Plaintiff petitions this Court to verify and amend the original petition for show cause to petition for *quo warranto*.

On June 29 a motion was presented by Plaintiff clarifying the (P. 24) issue in the above the entitled cause to the Circuit Court of Appeals also on same date motion was made by appellant to strike appellee's motion (P. 26) to deny appellant's motion for leave to verify petition and further amend petition (P. 29, 30).

Motion is made to this Court to join as additional parties as defendant one G. D. Hile, Assistant United States District Attorney (P. 27).

Motion is made also to order defendants to produce in this (P. 28) Court file of this case in their possession.

(P. 31) Is statement of points and designation of parts of record to be printed which was filed Oct. 3, 1942.

This Court is asked to cause to be issued a *quo warranto* in accordance with Rules of Federal Regulation as passed by Congress and any special relief to which appellant is entitled to and due for such injury to the person of appellant.

ARGUMENT OF CASE

(1) It is unlawful to conspire to commit any conspiracy against any provisions title 18, (Criminal Codes) U. S. C. A.

Title 18, section 88, (Criminal Code, Section 37)
Conspiracy to Commit Crime against the United States.

(2) It is the duty of the District Attorney of the United States to prosecute violations of the Laws of U. S.

Title 28, section 485, Judicial Code, U. S. C. A.
Griffin v. U. S., 299 F. 437

U. S. ex rel Hassel v. Matthews 27 F. 2nd 137

Title 8, U. S. C. A., Section 49, Chapter 3.

(3) The method of proceeding to institute action:
A civil action is commenced by filing a complaint with Court (P. 1) and by delivery to officer or agency a copy of summons and complaint to such officer. Said summons was issued by clerk of court with copy of complaint upon filing.

(4) District courts shall have original jurisdiction of all (P. 4) suits authorized by law to be brought by any person for the recovery of damages on account of any injury to the person, or loss.

Title 28 (Judicial Code, section 24) section 41, subdivision 12.

Title 18, section 546, U. S. C. (Criminal Code, section 340.

(5) Response to pleadings, if any:
Rule 12, B. C. E. G., Title 28, Federal Rules of Procedure following 723c.

Johnson & Gould v. Joseph Schilt Brewing Co.,
D. C. 1939, 28 F. Supp. 650.

Federal Life Insurance Co. v. Holod, D. C. Penn, 1939, 28 F. Supp. 270.

Appellee fails to follow procedure as set forth in (Rule 12E) Federal Rules of Procedures (P. 6):

Motion is made to dismiss action, re misjoinder of parties, motion to make more definite and certain as response to pleading. Motions which are based wholly or in part on other than Jurisdiction Grounds contribute a general appearance.

Johnson & Gould v. Joseph Schiltz Brewing Co., D. C. 1939, 28 F. Supp. 650.

(6) (1) Appellee claims appellant fails to state a claim upon which (P. 6) relief could be granted—insofar as defendant is concerned. Inspection of pleadings, page 1 to 3 of Record (and original pleading lines 7 to 13, lines 23 to 31, line 32, page 1 to line 3 page 2.) shows what relief could be granted.

(2) That District Court has no jurisdiction of subject matter (P. 6).

Title 34, U. S. C. A. Navy, par. 1.1515.
48 Statute 152, U. S. C. 468, (Par. 1, 3).

Murray v. Joe Gerrick & Co., et al., 172 Wash. 369.

Section 468 (Criminal Code, Section 289, Title 18, U. S. C. A.

Title 18, Section 451, Chapter 11, (Section 272, Criminal Code, Par. 3)

Title 28, Section 41, (Judicial Code, Section 24, Amended). Par. 2, 12.

(7) Upon hearing District Court Dismissed Action against defendant on the grounds contained in order of dismissal (P. 6).

(8) Plaintiff petitioned for rehearing of motion to dismiss (P. 14) and filed amendment to original pleadings (P. 16) upon hearing on plaintiff's petition for rehearing (P. 14, 15) and amendment to original pleading petition (P. 16) petition for rehearing is denied (P. 15).

(9) May 26, 1942 notice of appeal is filed from order of Judge (P. 17) appeal was taken in time.

Appellants filed with clerk of District Court designation of portions of record (P. 18) in record of appeal.

(10) Certificate of clerk to record on appeal (P. 21) filed Sept. 24, 1942 (P. 22).

(12) Motion is made in this Court for leave to verify petition (P. 23) and further amend petition (P. 23).

U. S. C. A., Title 28, Judicial Code, section 371, amended, section 256.

U. S. C. A. Title 18, section 451 (Criminal Code 272).

U. S. C. A. Title 28, section 777, note 122, page 90, re Bieler (C. C. A. N. Y. 1923) 295 F. 78. (Page 22, U. S. C. A. Cumulative Pocket Part, paragraph 112, 115) (119, Page 23),

MacAllister v. Sloan (C. C. A. Ark. 1936, 81 F. Supp. 707.

U. S. C. A. Title 28, Section 377, (A), (C)
(Judicial Code) section 262.

Newman v. U. S. Ex Rel Frizzell, (1915) 35 S. Ct. 881, 238 U. S. 537, 59 F. Ed. 1446 Reversing, 1915, 43 App. D. C. 53

(13) Motion is made to this Court to join additional defendants (P. 27) in the above entitled cause. Also motion is made to order the defendants to produce in this Court papers on file in possession of said defendants (P. 28).

(14) Appellee makes motion to strike appellant's motion for leave to verify petition and further amend petition and motion to produce in this Court papers in their possession (P. 29). Appellant so moves this Court to deny said motion.

Therefore appellant on appeal prays that this Court shall issue, against said persons in line 18 to 23 of original pleadings (Page 1, 2) a *quo warranto* in accordance with Title 28, U. S. C. A., section 377 (Judicial Code) Sec. 262 (A. C) and Section 777, note 1, section 377 B, U. S. C. A. in *Newman v. U. S. Ex Rel Frizzell*, 1915, 238 U. S. 537, 43 App. D. C. 53. Also any special relief which this Court should find is due to appellant for injury to the person as defined

in the laws of the U. S. of America, against appellees
in this cause of action.

MASON B. PATTEN, *Appellant*.

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Title 8, Section 49, Chapter 3, U.S.C.A.

Prosecution of Violation of Certain Laws:

The district attorney, marshals, the commissioners appointed by the district and territorial Courts, with power to arrest, imprison, or bail offenders, and every officer who is especially empowered by the President, are authorized and required, at the expense of the United States, to institute prosecutions against all persons violating any of the provisions of Section 51 of this title or of Sections 5506-5516 and 5518-5538 of the Revised Statutes, and to cause such persons to be arrested, and imprisoned or bailed, for trial before the Court of the United States or the territorial Court having cognizance of the offense (R. S. Section 1982).

Title 28, U.S.C.A. Section 225 (Judicial Code 128, Amended) Appellate Jurisdiction.

(a) Review of final decisions:

The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal—final decisions.

(1) In the District Courts, in all cases save where a direct review may be had in the Supreme Court. U.S.C.A., Title 28 (Judicial Codes, Section 777) Chapter 18, Note 122, page 90.

Defects in Forms, Amendments (on appeal):

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In *re Bieler* (C.C.A. N.Y. 1923) 295 F. 78.

Generally the allegations of a complaint may be amended to make the original statements more definite and precise, the test being whether the proposed amendment is a defferent matter, another subject of the controversy, or the same matter more fully or differently said.

Page 22, pocket supplement, par. 112, on a pepal, appellate Court may regard pleading as amended to conform to proof. (*McCallister v. Sloan* (C.C.A. Ark. 1936) 81 F. Supp. 707)

119: Amended complaint, making no change in facts relied on for recovery, but merely altering remedy, or result of facts alleged in original complaint, states no different cause of action and is proper (*McAllister v. Sloan* (C.C.A. Ark. 1936) 81 F. Supp. 707.

Title 18, Section 88 (Criminal Code, Section 37)

Conspiracy to commit offense against United States:

If two or more persons conspire either to commit any offense against the United States, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000 or imprisoned not more than two years or both.

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U.S.C.A., Title 18 (Section 51 Criminal Code, Section 19) Conspiracy to injure person in exercise of civil rights:

If two or more persons conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured by the United States, or because of his so exercising the same—with intent to prevent or hinder his free enjoyment of any right or privilege so secured, they shall be fined not more than \$5,000 and imprisoned for not more than ten years and shall moreover be thereafter ineligible for any office, or place of honor, or trust created by the Constitution or Laws of the United States. (R.S. Section 5508, Mar. 4, 1909, C. 321, p. 19, 35 Stat. 1092).

Title 18, U.S.C.A., Section 232 (Criminal Code, Section 126)

Subornation of Perjury:

Whoever shall procure another to commit any perjury is guilty of subornation of Perjury and punishable as in Section 231 of this title prescribed. (R.S. Section 5393, Mar. 4, 1909, C. 321, Page 126, 35 Stat.) Title 18, Section 546, U.S.C.A. (Criminal Code, Section 340)

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Jurisdiction of District Courts:

The crimes and offenses defined herein in this title shall be cognizable in the district court of the United States as described in Section 41 of Title 28, Judicial Code (Section 24, amended, p. 449, Federal Codes Annotated) :

Section 41, Title 28, the District Courts shall have original jurisdiction, subdivision 12, of all suits authorized by law to be brought by any person for the recovery of damages on account of any injury to the person or loss.

Where the loss sustained is conjectural and uncertain and cannot be accurately determined, the jury may award such damages as by competent evidence plaintiff appears to have sustained.

Subdivision 12.

Suits Covering Civil Rights: Twelfth.

Of all suits authorized by law to be brought by any person for recovery of damages on account of any injury to his person or property, of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy in Section 47 of Title 8.

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Title 28, U.S.C.A. (Section 377) (Judicial Code, Section 262) (A.C.) Act of Congress (Mar. 3, 1901, C. 854, Section 1538, 31 Stat. 1419; June 25, 1936, 49 Stat. 1921.)

(a) A *quo warranto* may be issued from the District Court of the United States for the District of Columbia in the name of the United States, as amended by the Act of June 25, 1936, C. 804, 49 Statute 1921—from the District Court of the United States for the District of Columbia.

(1) Against a person who usurps—unlawfully exercises within the district a franchise or public office, civil or military, and said proceedings shall be deemed a civil action.

(2) This section and 777B and 777C, in proper cases, instituted by proper officers or persons, may be enforceable against national officers of the United States. The sections are therefore to be treated as general laws of the United States, not as mere local laws of the District. (Newman v. U. S. Ex Rel Frizzell, 1915, 35 S. Ct. 881, 238 U.S. 537, 59 L. Ed. 1446 reversing 1915, 43 App. D.C. 53.)

(c) Same institution on refusal of attorney general and district attorney. If the attorney general and district attorney shall refuse to institute a *quo warranto*

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proceeding on request of a person interested, such person may apply to the Court for verified petition for leave to have such writ issued, and if in the opinion of the Court reasons set forth in said petition are sufficient in law, the said writ shall be allowed to be issued by any attorney, in the name of the United States, on the relation of the interested person, on his compliance with the conditions prescribed in Section 232 of this title as to security of costs. (Mar. 3, 1901, C. 854)

Title 18, U.S.C.A., Chapter 11, Section 451 (Criminal Code, Section 272, Par. 3)

When committed on any lands reserved or acquired for the exclusive or con-current jurisdiction thereof, or any place purchased or other acquired by consent of legislature of the State in which same shall be, for the erection of a fort, magazine arsenal, dockyard, or other needful building.

C.F.R., Title 34—Navy. Chapter 1. Department of the Navy. 1.1515—Observance of Laws.

(a) The Commandant or Commanding Officer of any Naval Station or other naval reservation situated within the limits of any state, territory, or District, which has been acquired by the United States through purchase or otherwise for Naval purposes, and over

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which the United States has exclusive jurisdiction shall require all persons on or within the limits of such stations or reservations strictly to observe all existing federal laws, and all laws of the state, territory or district wherein such place is located which were in force on March 4, 1909.

(b) Persons not in the Naval service who commit an offense on or within the limits of such station or reservation, which offenses are not made penal under the laws of the United States, but which, if committed within the jurisdiction of the State, territory or district in which such station or reservation is situated, would be subject to punishment in accordance with the laws of the state, territory or district concerned, existing March 4, 1909, shall be deemed guilty of a like offense and subject to the punishment. Such persons are subject, for such offense, to trial by the United States District Court for the district in which the Naval station is situated. (Section 28935 Stat. 1145, 48 Stat. 152 U.S.C. 468) (Par. 1, 3)

Federal Life Insurance Co. v. Holod, D. C. Pa. 1939, 28 F. Supp. 270.

A defendant desiring more particular or definite information than was set forth in complaint should not have filed a motion to dismiss, but should have re-

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sorted to means provided by the rules for securing that information.

Johnson & Gould v. Schlitz Brewing Company, 28 F. Supp. 650.

The decision of the judge of the court said: But under the provisions of the rules indicated, a defendant may join a motion questioning the jurisdiction of the person with a motion to dismiss because of merit of the complaint. But the provisions are not the same Rule 12E providing for a more definite statement or bill of particulars. So far as this case is concerned the time for filing such motion was before responding to a pleading. Irrespective of the rules of civil procedure, motions which are based wholly or in part on other than jurisdictional grounds constitute a general appearance.

Title 18, Section 468 (Criminal Code, 289)

Laws of states adopted for punishing unlawful acts:

Whoever, within the territorial limits of any state, or district, but within or upon any of the places now existing, described in Section 451 of this title, shall do not omit the doing of any act or thing not made penal by any Act of Congress, but which if committed or omitted within the jurisdiction of the state, terri-

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tory or district in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment. R.S. 5391, July 7, 1898, C. 576, Section 2, 30 Stat. 717, Mar. 4, 1909, C. 321, Section 289, 35 Stat. 1145.)

Murray v. Gerrick & Company, 172 Wash. 369, 20 P. 2d. 201. Excerpt:

The opinion of Judge Main.

There is nothing in the language of the Federal Act which would indicate an intention on the part of Congress to extend the industrial act over the Navy Yard (which is subject to the exclusive jurisdiction of the United States and within the exterior boundaries of this state).

Griffin v. U.S. 299 F. 437 (C.C.A. Pa. 1924)

The United States attorney and his assistants are officers of the Court upholding quasi-judicial positions, and it is their duty, not only to prosecute the guilty, but also to protect the innocent.

U.S. Ex Rel Hassell v. Mathews, 27 F. 2d. 137:

It was said by District Judge Dickinson: We cannot be too often reminded that every person has thrown

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around him the double protection (1) from unfounded accusation; and (2) from unjust conviction. In the ordinary course of prosecution, it is the duty of prosecuting officers, county magistrates and especially of grand juries to afford this first protection.

The right of protection is not a procedural one but is a substantive right.

